sentence. Apart from this we are of the view that the learned trial judge had taken into consideration all the relevant factors. Accordingly, we would reduce the sentence from six to five years' imprisonment to take effect from November 29, 1978.

It follows that the appeal against conviction is dismissed but we allow the appeal against sentence to the extent as above stated.

Appeal dismissed.

Solicitors: *Luping & Co.*

SIO KOON LIN & ANOR. v. S.B. MEHRA

[F.C. (Raja Azlan Shah C.J. (Malaya), Chang Min Tat & Syed Othman F.J.) March 11 & December 5, 1980]
[Kuala Lumpur — Federal Court Civil Appeal No. 211 of 1978]

Partnership — Partner withdrawing from partnership — Return of contribution — Provision for payment by instalments — Claim for full amount — Instalment not due.

Practice and Procedure — Claim for return of money — Money to be repaid by instalments — Amendment of writ — Effect of — Limitation — R.S.C. 1957, O. 28, r. 2.

The respondent had contributed $100,000 to a partnership and it had been agreed that this amount be repaid to him, $15,000 on the execution of the agreement, $35,000 on or before October 12, 1972 and the balance of $50,000 by monthly instalments of $10,000 on the 12th day of each succeeding month. There was no provision that in the case of default of any one instalment, the remaining instalments should become immediately due and payable. On October 7, 1972 the respondent took out a writ claiming *inter alia* payment of the sum of $85,000 with interest. This writ was subsequently amended on October 14, 1972 and a new prayer was added for the payment of any sum found due on the taking of accounts. The learned trial judge gave judgment for the respondent and the appellants appealed.

Held: (1) the respondent did not on October 7, 1972 have any cause of action in respect of the $85,000 or any part thereof, as no instalments were then due;

(2) the amendment to the writ dated back to the date of the original issue of the writ and at that date even the first instalment of $35,000 was not due.

Cases referred to:-

(1) *Eshelby* v. *Federated European Bank* [1932] 1 K.B. 254; [1932] 1 K.B. 423 C.A.

(2) *Sneade* v. *Wotherton etc. Co.* [1904] 1 K.B. 295.

FEDERAL COURT.

A.K. Bashir for the appellants.

V. Krishnan for the respondent.

Cur. Adv. Vult.

Chang Min Tat F.J. (delivering the judgment of the Court): The 1st appellant and the respondent, since deceased, (but for convenience we will continue to treat him as the respondent to the appeal), intended to form a limited company to be known as Kingwood Timber Industries Sdn. Bhd. and commenced trading even before the registration, as in the statement of claim, with the Registrar of Businesses. The monetary contribution made by the respondent was $100,000, which must be a considerable sum for a retired military officer. Later, without the knowledge of the respondent, the 1st appellant and the 2nd appellant formed a partnership. It dealt substantially with the same lines as the company and was given the same name Kingwood Timber Industries. There can be no doubt about the significance of the dual parts played by the appellants. Even to this military officer, the significance was clear when he found out the existence of the partnership business. The statement of claim referred to unhappy differences arising from this discovery. Whatever the real state of the affairs between them, the respondent then desired to withdraw from the business. He accordingly entered into another agreement with the 1st appellant on September 14, 1972. There were other agreements subsequently, but the agreement of September 14, 1972 was the one sued on.

The first recital acknowledged the respondent's contribution of $100,000 to the working capital of the company. The second referred to the registration of the appellants as partners of the company. This recital, though drafted by qualified practitioners, is wrong in law and in fact. The appellants had registered themselves as partners of a partnership business under the Registration of Businesses Ordinance and not under the Companies Act. The third recital referred to the agreement for the assignment of all of the respondent's rights in the company to the 1st appellant in consideration of the return of the capital contribution of $100,000 and a half share of the profits of the company from June 8, 1972 when presumably the company commenced trading to September 30, 1972. The document was to give effect to the agreement in the third recital. The profits anticipated in the agreement were enormous.

Of the several provisions in the agreement, we need concern ourselves strictly with the one relating to the return of the $100,000. A sum of $15,000 was paid on the execution, leaving $85,000 to be paid by future instalments. $35,000 was to be paid on or before October 12, 1972 and the balance of $50,000 was to be paid by monthly instalments of $10,000 on the 12th of each succeeding month. There is not the ordinary provision that in the event of default in the payment of any one instalment, the remaining instalments shall become immediately due and payable (this is yet again another example of the effect of having the same solicitor draft agreements between parties with conflicting interests). The other provisions are concerned with the ascertainment of the profits. For this purpose the respondent was to have access to the company's books.

On October 7, 1972, the respondent took out a writ against the partners of Kingwood Timber Industries. The distinction between the company in which the respondent had invested and the partnership entered into by the appellants was so vague that though the agreement sued on was between the respondent and the 1st appellant, no point was taken on the liability of the 2nd appellant under the agreement. The first statement of claim referred to the facts which have been set out leading to the discovery by the respondent of this partnership business and to the September agreement. It next referred to the refusal of the appellants to give access to the books for the determination of the profits, a half share of which for the period in the agreement was given to the respondent. It then asked for (i) judgment against the 1st appellant for $85,000 with interest, (ii) delivery of the account books, (iii) appointment of a receiver,

(iv) any consequential order and (v) costs on a solicitors and clients basis.

The obvious omissions in this statement of claim with respect to the claim for $85,000 were to a certain extent filled in by an amendment made on October 14, 1972. A paragraph referring to the September agreement and the main terms was put in and it was said that the balance of $85,000 was outstanding. A new prayer was introduced for the payment of any sum found due on the taking of the accounts.

The statement of defence raised the question of unenforceable moneylending and breaches of the Bill of Sale Ordinance in respect of the September agreement and, what is material to this appeal, the defence that the claim for $85,000 was premature. It is also to be observed that the defence raised no denial as to the rights under the agreement to accounts, the taking of such accounts and the payment of the profits for the period stated in the agreement and ending on September 30, 1972.

There is an interesting document in the Record at pages 73-81 (the first of its kind we have seen) compiled by the Assistant Registrar of the High Court at Malacca setting out *seriatim* the appearances in court on the very many matters raised before the trial of the action. These preliminary skirmishes went on from October 1972 and the hearing of the substantive action did not take place until January 1976. With various adjournments it was not completed until September 1977 and judgment was delivered only in September 1978.

In the result, judgment was given in favour of the respondent on all his prayers. The appellants appeal against the whole of the decision. Their memorandum of appeal contains many grounds of appeal which are of no substance and we need not be concerned with them. The one substantial ground that caused us some concern was the contention that at the issue of the writ there was no cause of action in respect of the $85,000.

The learned judge in his grounds of decision would appear to think the contention correct. He noted the absence of any clause making the remaining instalments immediately due and payable upon default of any one instalment, but he thought that the breach of the agreement in the matter of the account books which first occurred on September 18, 1972, was sufficient to make the whole sum payable and he held accordingly that at the issue of the writ on October 7, 1972 the respondent had a cause of action in respect of moneys to be paid sometime in the future.

With the greatest of respect, we do not agree. There can be no doubt that under the agreement, the respondent was entitled to a sum of $100,000 or rather the balance of $85,000 and to a half share of the profits for a certain period. The right to that sum of money was however by agreement qualified by a provision for payment in the future, so that his right to any instalment did not arise until the date for the payment of that particular instalment had arrived. His right however to his share of the profits became crystallised on September 30, 1972 when the period came to an end, and the share would be payable upon determination of the amount or a reasonable time after determination but we do not consider that the refusal of the appellants to allow inspection of the account books on September 18, 1972 and thereafter would by itself make the instalment payments immediately payable which did not have to be paid until, so far as the first instalment of $35,000 was concerned, October 12, 1972.

Two questions however remained for consideration: the amendment of the respondent's writ made on October 14, 1979 certainly without leave of the court, under the provisions of Order 28 rule 2 Rules of the High Court, 1957 and whether the amendment had the effect of validly introducing a cause of action in respect of the instalment of $35,000 which fell due on October 12, 1972, if not of the remaining $50,000. The amendment however sought was for $85,000 and this second question might well be of academic interest unless the order for payment of $35,000 could be made under the consequential order prayed for in the writ.

If as at October 7, the respondent had no right of action to claim for the $35,000, it is clear that any amendment would be to introduce a new cause of action which did not exist at the date of the writ and if the leave of the court is necessary, it would be refused: *Eshelby* v. *Federated European Bank.*[1] But as noted, the amendment was made without any requirement for leave and before delivery of the statement of defence. A subsequent application by the appellants to strike out the amendment on the ground that no leave was given for it was, after argument in open court, dismissed. With this order of court, the pleadings must be read as amended. If the effect of the amendment was to determine the cause of action as at the date of the amendment, that is, on October 14, 1972, the respondent would be clearly entitled to $35,000, an instalment due and owing. And if not, but the cause of action was to be determined at the date of the writ, then he would not be. On the authority of *Sneade* v. *Wotherton, etc. Co.*[2] in which Collins M.R. held at page 297

> "the writ as amended becomes the origin of the action and the claim thereon indorsed is substituted for the claim originally indorsed,"

the amendment dated back to the date of the original issue of the writ and the action continued as though the amendment had been inserted from the beginning.

It follows that the High Court erred in ruling that the respondent had on October 7, 1972 any cause of action in respect of the $85,000 or any part thereof. We come to this conclusion because authority compels us but with considerable sympathy for the respondent. What he should have done of course was to start another action or actions for the instalments as and when they fell due for payment but remained unpaid. This he cannot now do since in the considerable time that had elapsed before the conclusion of the case was reached in the High Court, the claim of the respondent for the $85,000 which he had contributed from his own pocket is now statute-barred, and there is no provision in law in this country akin to the provisions in the English Statutes of Limitation for the extension of time at the discretion of the court.

This case is not a solitary case on the harshness

of the absolute bar of time to an action. Whatever advantages there may be in striking out stale actions, the vesting of a discretion in the court to grant relief in a just and proper case to a litigant from the strictness of the time-bar, given to English courts and the courts of other countries, needs no pleading. We would strongly recommend to Government to consider a suitable amendment to the Limitation Ordinance, 1953.

The appeal must therefore be allowed, but clearly only as to that part which refers to the payment of the $85,000. There can be no possible doubt as to the cause of action and the right of the respondent to his share of the profits and the ancillary orders relating to this claim. The respondent shall keep his costs in the High Court but shall have to pay half the costs of the appeal.

Order accordingly.

Solicitors: *Bashir & Co.; Mah-Kok & Din.*

TIO CHEE HING v. CHUNG KHIAW BANK LTD.

[F.C. (Lee Hun Hoe C.J. (Borneo), Chang Min Tat & Syed Othman F.JJ.) September 8 & December 8, 1980]
[Kota Kinabalu — Federal Court Civil Appeal No. 167 of 1979]

Practice and Procedure — Execution — Judgments entered more than six years ago — Leave of Court — Discretion of Court — R.S.C. 1957, O. 42 r. 23.

In this case the respondents had obtained leave to issue execution against the appellant on two judgments entered more than six years ago. The reasons given for the delay were that there were negotiations for settlement by arrangement. The appellant appealed.

Held: that learned trial judge had exercised his discretion properly in this case and there was no reason for the appellate court to interfere with his discretion.

FEDERAL COURT.

T.S. Sidhu (*R. Sethu* with him) for the appellant.

Alex Khoo for the respondent.

Cur. Adv. Vult.

Chang Min Tat F.J. (delivering the judgment of the Court): This is an appeal from the decision of the judge to grant leave to issue execution against the appellant on two judgments entered more than six years ago.

Where six years have elapsed, Order 42 rule 23 Rules of the Supreme Court 1957 (with certain differences that are of no materiality in the application for leave, now Order 46 rule 2, Rules of the High Court 1980) requires leave of the court to be obtained. The court has a discretion in the matter and may exercise its discretion in favour of the applicant if satisfied that he is entitled to issue execution and with the cause or causes of the delay.

Judgment was entered against the appellant in two actions (Civil Suits Nos. 181 and 182 of 1969), both on April 6, 1970. In each case, the appellant had failed to enter appearance and judgment was entered in default of appearance. The former action was in respect of a charge to secure the repayment of a considerable sum of money advanced to a "Company" of which the appellant was the sole proprietor. The latter was for repayment of the overdraft granted to the appellant. Perhaps it was for the reason that there was possibly no defence to the actions that the appellant had at no time after the issue of the writs or the entry of judgment contested the validity of the claims against him.

The reasons for the delay were given by one Mr. Wong Theen Fook, the manager of the respondent Bank's Branch at Sandakan, in his affidavit in support of the application for leave. It was explained that after judgment had been entered, there were negotiations for settlement by arrangement. At that time, the appellant was making substantial payment by instalments towards another judgment sum in Civil Suit No. 260 of 1968 and clearly any further pressure on him would jeopardise the settlement of this debt without producing any favourable result in the satisfaction of the new claims. The Bank, perhaps not unreasonably, had hoped that so long as the appellant would be making his monthly or periodical payments, it might be in its own interests to give him time to pay off his debts to the Bank. Insofar as the land charged to the Bank was concerned, it was thought that sale by private treaty would fetch a higher sum, especially as the land was without potential for development. But as events showed, other creditors had also obtained various judgments against the appellant and had taken execution proceedings. It was time for the Bank to act in respect of these two judgment sums which had been entirely unsatisfied.

The learned judge found this explanation reasonable and unreservedly accepted it. He therefore exercised his discretion in the matter in favour of the application.

In so doing, he had not overlooked the very lengthy affidavit submitted by the appellant and the numerous exhibits annexed thereto — in all running to 80 foolscap pages. In it the appellant did not contest the validity of the Bank's claims against him. What he did do, in the main, was to give a history of his ventures in "agricultural development" and an explanation of his plight which he ascribed entirely to the machinations of the then State Government against him, especially in the matter of his application for land.

The learned judge formed the view that except for those parts in which the appellant referred to his attempts to settle the claims of the Bank, the affidavit was irrelevant to the consideration before him. And as events showed, the various proposals by the appellant to settle the claims of the Bank against him failed to produce any result. Nowhere had the appellant contended against the explanation that the reason for the delay in executing the judgments against him was to give him time at his request to resolve his financial difficulties.

For ourselves, we are unable, in all the circumstances of the case, to see how the learned judge had exercised the discretion vested in him wrongly. With respect, we entirely agree with his thinking and we accordingly dismiss the appeal with costs.

Appeal dismissed.

Solicitors: *Shelley Yap Chong Chia & Co.; Peter Lo & Co.*